Filed 3/13/19 P. v. Shaffer CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BILLY SHAFFER, Defendant and Appellant.	A153258 (Alameda County Super. Ct. No. C178348)

In the early morning hours of October 1, 2014, Connie Sowels was killed by a gunshot wound he suffered during an altercation with appellant outside the Bella Ultra Lounge in Oakland. Convicted of involuntary manslaughter, appellant argues the trial court erred in refusing to instruct the jury on accident, and abused its discretion in imposing the upper term on a firearm enhancement. We affirm.

STATEMENT OF THE CASE

Appellant was charged with murder (Pen. Code,[1] § 187, subd. (a)), with allegations that he personally used a firearm (§ 12022.5, subd. (a), 12022.53, subd. (b), 12022.53, subd. (g)), discharged a firearm (§ 12022.53, subd. (c) and (d)) and inflicted great bodily injury (§ 12022.7), and with possession of a firearm by a felon (§ 29800, subd. (a)(1)). After a jury trial, he was found not guilty of first and second degree murder and voluntary manslaughter, and guilty of involuntary manslaughter and possession of a firearm by a felon. The jury found the personal use of a firearm allegation true.

[1] Further statutory references will be to the Penal Code unless otherwise specified.

Appellant unsuccessfully moved for a new trial, on grounds including that the trial court erred in denying his request for a jury instruction on accident. He was sentenced to a total prison term of 13 years, consisting of the three-year middle term for the involuntary manslaughter plus a consecutive 10-year aggravated term for the firearm use enhancement. A two-year middle term sentence on the count of firearm possession was stayed.

STATEMENT OF FACTS

Appellant and Sowels had both been at the Bella Ultra Lounge on the night of the shooting. Corey Lyons, the head of security, had escorted appellant out of the club just before 1:00 a.m., a few minutes before closing time, because appellant had started to "fuss with" a woman in a white hat; earlier, appellant had given Lyons "the middle finger" and Lyons had warned him he would be kicked out if he did it again. Video from inside the club during the evening showed appellant talking to the woman in the white hat, as well as Sowels talking to that woman and to a woman with blond hair. The video showed that Sowels was wearing a gold chain necklace throughout the evening.

Antonio Reynolds, Sowels's cousin, met Sowels outside the club when Sowels came out at closing time. Reynolds testified that Sowels had been drinking and seemed like he had "had a good night." As they walked toward the corner of Clay and 11th Streets, Sowels said he had met an Asian girl with blond hair and gestured back toward the club entrance to indicate she was among the people leaving the club at the same time. Reynolds looked in that direction and saw appellant looking at him and walking toward where he and Sowels were standing at the corner. One of appellant's eyes was "kind of twitching . . . like maybe he was under the influence of alcohol or something" and he appeared to be "impaired."

Appellant was walking arm in arm with the woman in the white hat. Reynolds described the woman pulling on appellant's arm as they were passing him and Sowels to turn the corner, telling him to "come on" and "don't be starting no mess," as if he wanted to stop. Sowels raised his arms and said, "yeah, we don't want no problems." Appellant broke away from the woman and moved toward Reynolds and Sowels. Reynolds took a

step back and appellant "swung at" Sowels, who took a step to get out of the way. Reynolds noticed that the sturdy gold necklace Sowels always wore had broken and appellant was holding it. When Sowels noticed the chain was broken, he "charged [appellant] into the wall" and the two struggled, appellant trying to hold onto the chain and get away, while Sowels was reaching for the chain and trying to prevent appellant from getting away.

After about five to 15 seconds, Reynolds took a couple of steps toward them and saw appellant reach into his pocket and pull out a gun. People yelled "[h]e's got a gun" and "back up," and appellant said "back up" as he pulled the weapon and pointed it at Sowels's chest. Appellant was holding the gun with his right hand and still had the chain in his left hand. Reynolds looked away toward where he had seen two police officers in their car when he first got to the corner, and in his peripheral vision saw appellant run past him. As Reynolds turned his head to see where Sowels was, he saw Sowels run past him and tackle appellant, both of them falling into the street, tumbling over one another. Sowels had appellant "in a head lock with his head in a downward position" and they were "squirming on the ground," with Reynolds able to see the left side of Sowels's body and the right side of appellant's. As Reynolds started to go toward them, a "shot went off." Reynolds did not see the gun before the shot, but saw the chain in appellant's right hand. Sowels yelled that he had been shot. Appellant stood up, looked around and took off running back toward the club. When appellant stood up, Reynolds saw the chain in his right hand and gun in his left hand.

When interviewed by the police after the shooting, Reynolds said that Sowels was "sitting on his butt" with appellant in a head lock in front of him, as though they were "on a bus." At trial, he did not remember having said this or having seen Sowels and appellant "back to chest," and testified that they were always in front of each other. He testified that he was watching the entire time from the tackle to the shot and never saw appellant on his back with Sowels on his knees punching appellant.

Corey Lyons, the head of security at the Bella Ultra Lounge, was talking with the owners on the fire escape balcony, which overlooked 11th Street towards Clay, after the

club closed on October 1. One of the owners said, " 'look, look, they are fighting.' " Looking down, Lyons saw appellant reach into his waistband with his right hand and pull a gun "out to the guy's head." Appellant did not have anything in his left hand. Lyons yelled "gun" into his walkie-talkie. As soon as he did so, appellant put the gun away in his waistband and took a step, starting to walk away, and Lyons thought the fight was over, but the victim suddenly hit appellant. Lyons initially testified that the victim hit appellant in the face and the two started "tussling," "fight[ing] backwards" and moving toward Clay Street; later in his testimony, he said the fight resumed with the victim "sucker punch[ing]" appellant in the back of his head and appellant "going backwards" with the victim "punching towards him" and appellant "falling backwards" and "upwards fighting." Lyons never saw appellant lying on his back on the ground, only walking backward exchanging punches with the victim.

Lyon headed outside and, as he was going downstairs, heard a gunshot. Lyons saw appellant run toward 10th Street and chased but was unable to catch him; he saw appellant jump into a parked car and drive toward the freeway. Lyons testified that he did not see a gun in appellant's hands as appellant was running, but in his statement to the police at the time, he had said that appellant still had the gun in his right hand. Lyons returned to give aid to the victim, putting pressure on the wound, which was in the area of his belt buckle, until the paramedics arrived. The victim's friend, who had been holding the wound, was screaming and crying, and said, "nigga shot my friend, and took his chain." The victim was talking and Lyons tried to calm him down. Lyons testified that all patrons are searched for weapons before entry to the club.

Sowels was transported to Highland Hospital, where he was pronounced dead at 1:50 a.m. Forensic Pathologist Judy Melinek testified that the cause of death was a "penetrating gunshot wound" to the abdomen. The bullet went through Sowels's belt buckle before entering his body. The autopsy findings were consistent with a bullet trajectory going from front to back, left to right and slightly upward, with the caveat that the belt buckle "may have deflected it." Melinek testified that because of the bullet hitting the belt buckle, the trajectory of the bullet in the body did not allow her to say

with "any probability" what direction the gun was pointed. Melinek also could not determine the range from which the gun was fired, as the evidence was consistent with the gun being either in contact with the belt or more than three feet away.[2] Additionally, Melinek found abrasions on Sowels's shins, below the knee and on the upper left side, which were consistent with falling against a pavement or moving around while kneeling on cement. There were no injuries on the hands, and Melinek did not notice any injuries to Sowels's neck. She testified that punching someone does not always result in injuries to the hands; punches to a soft part of the body such as the abdomen might not leave marks on the hands while such injury might result from punching bone on the face. Similarly, the absence of injury to Sowels's neck did not necessarily indicate the necklace was not yanked off, as no mark would be left if the necklace broke immediately. Sowels's blood alcohol level was 0.14 grams percent, almost double the legal limit for driving.

The police found at the scene a .45 caliber magazine loaded with live ammunition, with no firearm attached; a .45 caliber expended casing; and a belt that had been removed from the victim, the buckle of which appeared to have been shot through.

Lyons identified appellant in a photo lineup two days after the shooting. Reynolds initially identified both appellant and a "filler" in the lineup. He then positively identified appellant in surveillance video footage from the night of the shooting. After appellant was arrested, Reynolds identified him in a physical lineup.

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[2] Melinek initially testified that it was possible the gun was fired from close range (within six inches) but, because the evidence was not definitive, she "would call it intermediate" (six inches to three feet), which she testified meant "I can't tell." On cross-examination, asked about an interview in which she told the defense that the shot was fired from close range, Melinek explained that she subsequently read articles indicating that the findings that led her to this conclusion were not definitive. Later, called as a witness for the defense, Melinek testified that if she said "close" range in the interview, this was inaccurate: The findings indicated either "contact range" ("right up against the belt buckle") or "distant range" (more than three feet), not "close range" (within six inches but not touching).

Appellant was arrested on October 13. He denied being at the club on the night of the shooting and said he had never been escorted out of the club, had never gotten in a fight, and did not have a firearm. A video clip found on appellant's phone showed him holding two guns. Detective Phong Tran, the lead investigator for this homicide, testified that one of the guns in the video was the "exact" type of gun that the magazine found at the scene goes to, a .45 caliber Springfield XD. Police Officer Jake Hensley testified that the magazine of a semiautomatic weapon can be detached, typically by depressing a button on the firearm that releases the magazine from the handle of the weapon. A deliberate act would be necessary to make the magazine come out.

The prosecution presented evidence of uncharged misconduct involving an incident in June 2009. Joshua Carlton, who was working as a security guard at the Empire Event Center, testified that he saw appellant without a shirt and asked him to put the shirt back on; appellant was "mildly combative" and refused, and when Carlton put a hand on his arm and asked him to come outside to talk, appellant "lunged" at him with a knife. Someone grabbed appellant's arm and stopped him, and other security guards escorted him outside. David Mendoza, another security guard, talked to appellant and walked him to his car. As Mendoza was returning to the club, appellant pulled up next to him in a Jaguar, displayed a handgun and said, "if it wasn't for you, this wouldn't have went well. It would have been all bad." The incident was reported to the police, who detained the car appellant was driving and found a loaded .40 caliber Beretta handgun on the floor under the steering column, near the gas and brake pedals. Appellant was charged with possession of a firearm and brandishing a non-firearm.

Defense

Defense Investigator Scott Heilig testified that when the defense attorneys interviewed Dr. Melinek, she "mimicked" the "possible trajectory" of the gunshot in a scenario where appellant was on his back and the other individual was standing over him. Heilig testified that Lyons, in his interview, said that after appellant walked away, the victim rushed up and "sucker punched" appellant in the back of the head, knocking him to the ground facedown, then as appellant tried to turn over, the victim put his knees on

the ground, got on top of him and repeatedly punched him, alternating punches with his left and right hands. Lyons also said that appellant had nothing in his hands and was " 'just trying to defend himself,' " and that he never heard anyone say anything about jewelry or saw appellant reach for or take the victim's necklace.

Tedros Kiflit, one of the owners of the Bella Lounge, testified that from the fire escape he saw "a little fight" in which two men were "pushing and shoving" and "throwing fists." Kiflit testified that neither man had anything in his hands before appellant drew a gun with his right hand; he later acknowledged that he could not actually see what appellant had in his hand but believed it was a gun. The victim said something like " 'are you going to shoot me now' " and raised his hands, palms forward; at the same time Lyons and Kiflit yelled " 'he got a gun' " and " 'there's a cop.' " Appellant lowered the gun from the face to the neck or chest area and "turned his face just a little bit" as if to run away, then the victim "went quickly" and punched him in the back; appellant stumbled and fell, not flat on his back but bent at the waist with his legs on the ground and his upper body raised. The victim "jumped on" appellant, "trying to take the gun away or whatever it was" but punching him at the same time; appellant was also throwing punches, but one of his hands was not moving "so maybe he was holding or protecting the gun," and the victim was "a lot more aggressive." The two men rolled a few times, all the way to the street. At the point the gun fired, appellant was underneath the decedent; he pushed the body, stood up, looked around, and "took off."

Defense Investigator Heilig's report stated that when interviewed in November 2015, Kiflit said that he heard the victim yelling something like " 'fucking bitch, why don't you shoot me now' " while punching appellant "at least 20 more times," and that it appeared the victim was trying to take the gun away from the appellant.

The defense presented evidence of prior assaults committed by Sowels. In January 2007, Sowels was arrested after he and two other men beat up Brian Onyegegbu, who had attempted to stop the men from bothering a group of his female friends. In December 2009, Roneisha Winslet told a police officer who responded to a domestic violence report that Sowels, her boyfriend, had repeatedly punched her in the face and

forced her to get out of the car in which they were driving. In September 2010, Courtney Winslet told a police officer that she had seen Sowels beat her cousin, Leneisha Winslet, on several occasions.

DISCUSSION

I.

Defense counsel requested a jury instruction on accident on the theory that the gun discharged accidentally during the struggle between appellant and Sowels. CALCRIM No. 510 informs the jury that a killing resulting from "accident or misfortune" is "excused, and therefore not unlawful," if the defendant was "doing a lawful act in a lawful way," "acting with usual and ordinary caution," and "acting without any unlawful intent."[3] The trial court denied the request for this instruction because it found there was no substantial evidence appellant was "doing a lawful act in a lawful way" when Sowels was shot, in that appellant was a felon in possession of a firearm.[4]

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[3] CALCRIM No. 510 provides: "The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone as a result of accident or misfortune. Such a killing is excused, and therefore not unlawful, if:

1. The defendant was doing a lawful act in a lawful way;

2. The defendant was acting with usual and ordinary caution;

AND

3. The defendant was acting without any unlawful intent.

A person acts with *usual and ordinary caution* if he or she acts in a way that a reasonably careful person would act in the same or similar situation.

The People have the burden of proving beyond a reasonable doubt that the killing was not excused. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] manslaughter)."

[4] The trial court did not find there was an absence of evidence that the shooting was accidental; indeed, as appellant points out, prior to trial the court commented in the course of discussion on a different point, "I can see the defense very well arguing, hey, this was completely accidental. He didn't mean to fire the gun. They were thrashing around on the ground, the gun even went off." As appellant points out, no witness saw the gun during the part of the physical struggle in which the shot was fired and there was no evidence as to how the trigger was pulled. In an apparent effort to demonstrate that it was unlikely he intended to shoot Sowels, appellant notes that when he initially pointed

The defense subsequently requested that the jury be instructed pursuant to CALCRIM No. 3404 that "[t]he defendant is not guilty of [murder] if he acted without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of [murder] unless you are convinced beyond a reasonable doubt that he acted with the required intent." This instruction implements section 195, which provides that "[h]omicide is excusable" when "committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent" or "committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner." Defense counsel argued that "the focus of the inquiry (as to the lawful act) should be the lawful self-defense, as opposed to the possession of weapon by an ex-felon."

Denying the request, the court stated, "The reason I'm not going to give this instruction is that under the facts of this case, the only way that the offense might be lawful is in fact if self-defense—perfect self-defense was executed, was found to be true. And if it were found to be true, the defendant would be found not guilty. So I think that by definition, it is for the jury to determine whether it's a lawful act. It is not a lawful act if it is either a second degree murder, voluntary manslaughter or involuntary

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the gun at Sowels, he did not shoot but rather tried to leave; he also points out that he did not fire the gun he displayed in the 2009 incident either, suggesting he had a habit of possessing a gun but not firing it. At trial, despite the absence of an instruction on accident, defense counsel argued the theory to the jury, saying it was "absolutely reasonable" to find the gun went "off accidentally in the course of a struggle." Counsel pointed to Kiflit's testimony that Sowels was "pulling on something" during the struggle and argued that since there was evidence that the magazine could not simply fall out of the gun by itself, the fact that it was found next to Sowels immediately after the shooting showed there had been a struggle over the gun.

manslaughter. So to give 505, I think would undercut the more restrictive aspects of self-defense, particularly the objective component."[5]

Appellant argues the trial court erred in refusing the accident instruction on the basis of appellant being a felon in possession of a firearm because, despite his unlawful possession, he had a right to defend himself from Sowels's attack.[6] He asserts that "the mere possession of a gun by a felon cannot support an involuntary manslaughter conviction and, thus, does not preclude an instruction regarding accident."

Appellant's first premise may be true enough. Possession of a firearm by a felon is not an inherently dangerous felony. (*People v. Satchell* (1971) 6 Cal.3d 28, 40–41, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 490, fn. 12; *People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89) When, as here, involuntary murder is predicated on the commission of a noninherently dangerous felony, it must also be demonstrated that

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[5] The trial court appears to have misspoken in referring to "505," the CALCRIM instruction on self-defense, which *was* given at trial. The instruction on accident is CALCRIM No. 510.

[6] Respondent does not address the trial court's reason for finding the accident instruction inapplicable. Instead, respondent argues that the instruction was properly denied because appellant killed Sowels in the course of a robbery, pointing out that "a correct decision of the trial court must be affirmed on appeal even if it is based on erroneous reasoning." (*Green v. Superior Court* (1985) 40 Cal.3d 126, 138.) Appellant takes this to mean that respondent concurs in his assessment that the trial court's reasoning was erroneous, and further argues that he was not charged with robbery and the jury was not instructed on robbery and did not find a robbery occurred.

Although appellant was not charged with robbery as a separate offense, appellant ignores the fact that the jury was instructed on the elements of robbery as part of its instructions on felony murder—the theory that Sowels was killed in the course of a robbery. Contrary to appellant's argument, there was certainly evidence from which the jury could have concluded that appellant robbed Sowels, if it credited Reynolds's testimony on this point. With respect to the accident instruction, however, the question whether appellant robbed Sowels was for the jury to determine and the trial court therefore could not have properly used robbery as the unlawful conduct that justified denying the request for an accident instruction. Appellant conceded he was guilty of being a felon in possession of a firearm.

the felony was "committed without due caution and circumspection." (*People v. Brothers* (2015) 236 Cal.App.4th 24, 31, quoting *Burroughs*, at p. 835.) "Lack of 'due caution and circumspection' " is "the equivalent of 'criminal negligence.' " (*People v. Penny* (1955) 44 Cal.2d 861, 879–880.) It follows that the unlawful act of possessing a firearm as a felon could be the basis of an involuntary manslaughter conviction only if committed with criminal negligence.

We fail to follow appellant's reasoning, however, in concluding that this means possession of a firearm by a felon does not preclude an instruction regarding accident. The availability of an accident instruction depends upon the existence of substantial evidence that, among other things, the defendant was "doing a lawful act in a lawful way." Here, appellant not only possessed a firearm unlawfully, he made use of the firearm to create the situation that ultimately led to Sowels's death.

Appellant focuses on the fact that Sowels was the aggressor in the portion of the incident that directly resulted in the shooting. But there is significant evidence that appellant not only provoked the overall confrontation with Sowels but did so after deliberately arming himself: Since the evidence showed that appellant was searched for weapons when he entered the club earlier in the evening, he can only have armed himself between the time he was escorted from the club just before closing and the time he engaged with Sowels shortly thereafter. Reynolds, the only witness at trial who saw the beginning of the incident, testified that appellant initiated it by coming toward Sowels, swinging at Sowels and taking the gold necklace Sowels was wearing. But however the incident began, appellant escalated it by pulling out the gun and pointing it at Sowels's head, introducing an obvious risk of death or great bodily injury into the confrontation as Sowels reacted to the weapon. Appellant's use of the gun was, of course, an unlawful act.

As appellant characterizes the situation, his brandishing of the firearm is not relevant because he then ended the encounter by starting to walk away, only to be thwarted by Sowels's pursuing and attacking him. But even if this would have been sufficient to make appellant's use of the gun irrelevant, a point we need not resolve, the

evidence does not so neatly establish two discrete phases of the incident. Lyons testified that he assumed the fight was over when appellant stepped away, and that Sowels suddenly hit appellant in the back of the head. He initially testified, however, that Sowels hit appellant in the face, and even when he testified that Sowels hit appellant in the back of the head (after being shown his prior statements to the police), Lyons consistently described appellant moving backwards, facing Sowels. Kiflit, the other witness who saw this part of the incident, testified that after pointing the gun at Sowels appellant only turned his face slightly, as if to run away. By all accounts, the entire incident happened very quickly.

It is apparent that appellant's pointing the gun at Sowels was a significant aspect of the altercation. Whether Sowels resumed the physical confrontation in a rage after having the gun pointed at him or, as Reynolds described it, in an attempt to regain possession of his gold necklace, there is no question that appellant did not merely possess a firearm but actively used it in an already volatile situation. That he put the gun away does not make his conduct any more lawful. Whether in appellant's hand or his waistband during the ensuing fight, the risk of the gun being fired was obvious—in the course of a struggle to take hold of the weapon, as an intentional act or as an accidental consequence of the combatants' physical actions. At the time of the shooting, appellant was neither "doing a lawful act in a lawful way" nor "acting with usual and ordinary caution," as is also required for an accident instruction to be applicable.

Moreover, as the trial explained, if the jury found appellant acted in self-defense, it could not have found him guilty of involuntary manslaughter, because the jury was instructed that if it found appellant acted in lawful self-defense, it could not find him guilty of murder, voluntary manslaughter *or involuntary manslaughter*. In that scenario, an instruction on accident would have been unnecessary. Appellant does not suggest what lawful act he might have been engaged in if not self-defense. We find no error in the court's refusal to give the instruction.

II.

Appellant also challenges the trial court's decision to impose an aggravated sentence on the section 12022.5, subdivision (a), firearm enhancement. Sentencing decisions are reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' ([*People v. Superior Court (Alvarez)* (1997)] 14 Cal.4th [968,] 978.)" (*Sandoval*, at p. 847.) A trial court abuses its discretion "if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Ibid.*)

The trial court explained that it was imposing the aggravated term based on three aggravating circumstances: the crime involved great bodily harm or death (Cal. Rules of Court,[7] rule 4.421(a)(1)), the defendant engaged in violent conduct which indicates a serious danger to society (rule 4.421(b)(1)), and the defendant's prior performance on probation was unsatisfactory (rule 4.421(b)(5). The court found no circumstances in mitigation.

Appellant argues that the first two aggravating factors cited by the court do not apply in this case, and that if the third applies, it was balanced by mitigating factors. Relying upon the principle that "an aggravating factor must make the offense distinctively worse than it would ordinarily have been" (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 682), appellant argues the involuntary manslaughter in this case does not satisfy this test. In our view, application of this principle to the present case requires a modification the parties do not discuss: Because we are concerned with the choice of sentence on an *enhancement* rather than on the substantive offense, the question is whether the aggravating factor makes the conduct described in the *enhancement* distinctively worse than it would ordinarily have been. (*People v. Douglas* (1995) 36

[7] Further references to rules will be to the California Rules of Court.

Cal.App.4th 1681, 1691 ["aggravating factors existed beyond that which would result from mere use of the gun itself" where defendant pointed gun at victim's face, threatened her and put gun close to her head].)[8]

Citing *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1357, appellant argues that the first aggravating factor the trial court cited, great bodily harm, cannot be used to impose an upper term because he was convicted of involuntary manslaughter. *Piceno* applied the rule that "[a] fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term" (rule 4.420(d)) to conclude that great bodily harm could not be used as an aggravating factor in sentencing to impose an upper term sentence on an involuntary manslaughter conviction because "death—the greatest of all bodily harm—is . . . an element of this crime." Respondent agrees that appellant's argument is meritorious. We have some question, because of the distinction just described: *Piceno* involved sentencing on the underlying offense rather than on an enhancement. We need not resolve the issue, however, because we would affirm the trial court's decision even assuming it should not have relied upon this aggravating factor.

Appellant contends the trial court abused its discretion in relying upon rule 4.421(b)(1)—that he engaged in violent conduct indicating a serious danger to society—because appellant was "merely responding defensively to Sowels's sucker-punch attack" and the gun "may very well have fired accidentally as a result of Sowels's pulling on it."

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[8] As explained in *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1779, selection of the term for a substantive offense and for an enhancement are distinct sentencing choices made pursuant to parallel sentencing schemes (see *People v. Hall* (1994) 8 Cal.4th 950, 959-963; *Garcia*, at p. 1779.) A trial court may not impose the upper term on an enhancement based on factors relating to the underlying substantive offense that do not relate to the enhancement. (*Garcia*, at p. 1779.) "In selecting the base term for a substantive offense . . . , the trial court can use facts under rule 421(a) only if they relate to that offense. *Mutatis mutandis*, in selecting the base term for an enhancement, the trial court should use facts under rule 421(a) only if they relate to that enhancement." (*Ibid.*; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [court "may consider any aggravating circumstances relating to the firearm use and to the defendant in deciding whether to impose the upper term for a Penal Code section 12022.5, subdivision (a) enhancement"]; *People v. Douglas, supra,* 36 Cal.App.4th at p. 1691.)

As discussed above, appellant's attempt to minimize his culpability by separating the phase of the encounter in which the gun discharged from the phase in which appellant initiated or at a minimum seriously escalated the encounter by pointing his gun at Sowels's head is unpersuasive. The trial court made the same point at the sentencing hearing, when defense counsel argued that the court should consider as a mitigating factor that appellant had begun to walk away when Sowels aggressively resumed the altercation. Rejecting this argument, the court stated that appellant "wasn't supposed to have the gun in the first place, and he chose to bring it to the night club. And in that respect, he is responsible for initiating this whole tragic chain of events." As we have said, appellant deliberately armed himself and provoked a situation posing extreme risk to both the victim and the many other people in the immediate vicinity. Not only was he in unlawful possession the firearm as a felon—the offense upon which the involuntary manslaughter theory was based—he affirmatively introduced the firearm into what was already a physical altercation, thereby increasing the danger of serious injury or death to the victim, himself, and bystanders. As in *People v. Douglas, supra,* 36 Cal.App.4th at page 1691, "the evidence shows circumstances beyond that which was necessary for finding use of the gun."

Appellant also challenges the trial court's reliance upon rule 4.421(b)(5), that his performance on court probation was unsatisfactory. He contends that the probation report provided no detail in support of its conclusion that appellant's "overall prior performances on probation in this county were unsatisfactory" and did not indicate that appellant had ever had his probation revoked. The latter point is incorrect: The probation report stated that appellant was "not active to probation in Alameda County at the time of the current offense" but "[o]verall, he incurred 15 revocations and 11 failures to appear before the court." Even without further detail, this is ample support for the trial court's reliance upon this factor.

Appellant further argues that even assuming rule 4.421(b)(5) applied to this case, it was balanced by the mitigating factors that his criminal record is "relatively minor" (rule 4.423(b)(1)), he expressed sincere apology for his actions, Sowels initiated and was

a "willing participant in" the fatal struggle (rule 4.423(a)(2)), and appellant was under duress when the gun went off (rule 4.423(b)(4)).

Neither the probation report nor the court found any applicable mitigating circumstances. The last two of the factors appellant suggests relate to his characterization of the shooting as occurring during a distinct phase of the encounter that resulted from Sowels's aggression, a view we have rejected (as did the trial court). There is no likelihood that the court would have seen appellant's criminal history as a mitigating factor. According to the probation report, appellant had a history of misdemeanor offenses in Alameda County, including one for carrying a loaded firearm, and felony convictions from Sacramento County for exhibiting a loaded firearm and carrying a loaded firearm, demonstrating "a pattern of firearm related offenses." This history only reinforces the concern the trial court expressed over appellant's firearm use. The last mitigating factor appellant suggests—that he expressed sincere apology—was not raised in the trial court.[9] Putting aside any question of forfeiture (*People v. Scott* (1994) 9 Cal.4th 331, 353), as the probation report noted that appellant "apologized for his actions in a sincere tone of voice," we presume the court was aware of this point and, like the probation department, did not view it as significantly mitigating.

"A single factor in aggravation will support imposition of an upper term. (*People v. Castellano* (1983) 140 Cal.App.3d 608, 615.) 'When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.' (*People v. Price* (1991) 1 Cal.4th 324, 492.)" (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433–434.) Assuming, in keeping with the parties' agreement, that the trial court erred in relying upon the great

[9] Appellant's sentencing memorandum argued three mitigating factors: that the victim was an "initiator of, willing participant in, or aggressor or provoker of the incident" (rule 4.423(a)(2)), that the "crime was committed because of an unusual circumstance, such as provocation, that is unlikely to recur" (rule 4.423(a)(3)), and that appellant had an "insignificant record of criminal conduct" (rule 4.423(b)(1)).

bodily harm factor, we see nothing in the record to support appellant's assertion that this was the "foremost factor" or "main reason" for the court's decision to impose the aggravated term. The trial court's remarks make clear that it was disturbed by appellant's deliberate choice to arm himself and then engage in the altercation with Sowels's, especially given his status as a felon. We find no reasonable probability the court's decision would have been different if it had not considered the infliction of great bodily injury as an aggravating factor.

Finally, appellant argues in his reply brief that a remand for resentencing is the only "fair and equitable result" because section 12022.5 has been amended to give trial courts discretion to strike firearm enhancements (Stats. 2017, ch. 682, § 1), and this change in law applies retroactively to cases not final before it became effective on January 1, 2018. (*People v. McVey* (2018) 24 Cal.App.5th 405, 418.) Appellant offers no explanation for failing to raise this point in his opening brief, which was filed several months after the amendment to Penal Code section 12022.5 became effective. " '[P]oints raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' " (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26, quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 616, p. 648.) In any event, remand is not required where the record shows the trial court would not have exercised its discretion even if it had believed it could do so. (*McVey*, at p. 418.) Appellant's firearm use was the critical issue in this case. Despite imposing a middle term sentence on the involuntary manslaughter, the trial court imposed the aggravated term on the firearm enhancement. Having thus demonstrated its view that appellant's conduct with respect to the firearm was particularly serious, we see no possibility that the court would exercise its discretion to strike the enhancement altogether. (*Id.* at p. 419.)

DISPOSITION

The judgment is affirmed.

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Kline, P.J.

We concur:

_____
Richman, J.

_____
Miller, J.

People v. Shaffer (A153258)